

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re BRIDGESTONE/FIRESTONE, INC.
ATX, ATX II AND WILDERNESS TIRES
PRODUCTS LIABILITY LITIGATION

MDL No. 1373

Centralized before Hon. Sarah
Evans Barker, Chief Judge
Magistrate Judge V. Sue Shields

JOSHUA H. MILLER,
Plaintiffs,

v.

Individual Case Number:
IP 00-5066-C-B/S

BRIDGESTONE/FIRESTONE, INC.,
SEARS, ROEBUCK AND CO., and
FORD MOTOR COMPANY
Defendants.

**DEFENDANT SEARS, ROEBUCK AND CO.'S MOTION FOR LEAVE TO FILE
CROSS-CLAIM AGAINST DEFENDANT BRIDGESTONE/FIRESTONE, INC.
AND INCORPORATED MEMORANDUM IN SUPPORT**

Defendant SEARS, ROEBUCK AND CO. ("Sears"), through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 13 and 15 and the local rules of this Court, for its Motion for Leave to File Cross-Claim Against Defendant BRIDGESTONE/FIRESTONE, INC. ("Firestone") and Incorporated Memorandum in Support, states as follows:

1. This matter involves claims by Joshua Miller ("Plaintiff") that he was seriously injured as a result of the tread separation of a defective tire manufactured by Defendant

Firestone. Plaintiff filed this cause of action against Firestone, Sears, and the Ford Motor Company. Sears was served with the lawsuit on August 29, 2000.

2. Shortly thereafter, Sears tendered the defense and indemnity in this matter to Firestone pursuant to, among other bases, the terms and conditions of a Letter of Agreement between Sears and Firestone concerning the purchase of Firestone tires. Firestone initially indicated that it would accept the tender, and retained counsel to represent both Sears and Firestone. Retained counsel then filed an appearance and answer on behalf of Sears on October 26, 2000.

3. Subsequently, Firestone equivocated about whether, in fact, it was accepting the tender of defense of this matter. Counsel for Firestone exchanged correspondence and met with national counsel for Sears concerning the issue over the course of several months. Then, in April 2001, the attorneys initially retained by Firestone to represent Sears filed a motion for leave to withdraw as counsel for Sears.¹ To date, notwithstanding this indemnity agreement, co-defendant Firestone, has refused to accept Sears' tender of defense and indemnity in this matter.

¹Counsel has improperly filed its Motion for Leave to Withdraw as Counsel for Sears, Roebuck and Co. in the transferor court, the United States District Court for the Eastern District of Arkansas, which has no jurisdiction over this matter.

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4. Based on the foregoing, Sears seeks to file a Cross-Claim against Firestone for indemnification based on the aforesaid Letter of Agreement. A copy of the proposed Cross-Claim Against Defendant Firestone is attached hereto as Exhibit "A."

WHEREFORE, Defendant, SEARS, ROEBUCK AND CO., respectfully requests this Court enter an Order Granting this Motion for Leave to File Cross-Claim Against Defendant BRIDGESTONE/FIRESTONE, INC., *instanter*, and for such further relief as this Court deems just.

**MEMORANDUM OF LAW IN SUPPORT OF SEARS' MOTION FOR LEAVE TO FILE
CROSS-CLAIM AGAINST DEFENDANT BRIDGESTONE/FIRESTONE, INC.**

The Federal Rules of Civil Procedure relating to cross-claims are intended to avoid circuity of action and to dispose of the entire subject matter arising from one set of facts in one action, and they are remedial and should be liberally construed. Blair v. Cleveland Twist Drill Co., 197 F.2d 842, 845 (1952). Fed. R. Civ. P. 13 (g), 15 (2000). Although the right to file an additional or supplemental pleading is not automatic, a district judge should freely grant leave to do so when justice requires, absent a substantial reason to deny. Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234-35 (2d Cir. 1995). Determining whether to grant leave is within the Court's discretion, and in exercising its discretion the Court should be guided by the underlying purpose of facilitating a decision on the merits. Filmtec Corp. v. Hydranautics, 67 F.3d 931, 935 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 62 (1996).

In this case, justice would be served, and a full and final decision on the merits would be facilitated, by allowing this motion. There is no evidence that Sears has caused

any undue delay in these proceedings. This case was removed to federal court in September 2000, and shortly thereafter, was the subject of a Notice of Related Action to the Judicial Panel on Multidistrict Litigation ("Panel"), as a tag-along action. On December 1, 2000, this Court received the First Conditional Transfer Order, which transferred this case to MDL 1373. Since then, only limited case-specific discovery has been done. Moreover, discovery in the MDL does not close until February 2000. The filing of this cross-claim will not have implications with respect to the discovery that has been conducted in the case, and the parties will have ample time to conduct discovery with regard to this cross-claim. Accordingly, the granting of this motion will not cause any delay.

Similarly, Sears did not file this motion with any bad faith or dilatory motive. Despite Sears' tender of defense and indemnity to Firestone on September 11, 2000, and several follow-up written and oral discussions with Firestone's counsel, during which counsel for Firestone indicated that the matter was under consideration by Firestone, and that Firestone "would probably" accept Sears' tender, the company has failed to do so. Thus, if there have been any dilatory motive in this case, it has been that of Firestone, which has attempted to avoid this cross-claim by attempting to lull Sears into believing that it is accepting the tender of defense, while failing to do so.

Neither Firestone nor any of the other parties to this lawsuit can reasonably claim prejudice by the granting of this motion. Firestone has been on notice since the onset of this litigation that Sears looked to it for indemnification pursuant to the Letter of Agreement

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between Sears and Firestone concerning the purchase of Firestone tires. Firestone can claim neither surprise nor undue prejudice as a result of this motion.

Nor can it be argued that the proposed amendment would be futile. In this case, Sears is able to state a valid legal claim for indemnification against Firestone. The Letter of Agreement executed by and between Sears (the Purchaser) and Firestone (the Seller) concerning the purchase of Firestone tires expressly requires Firestone to defend and indemnify Sears under the foregoing circumstances. Therefore, Sears is able to state a valid legal claim for indemnification against Firestone and, as a result, this motion for leave to amend should be granted by this Court.

Finally, judicial economy favors the granting of this motion. Denial of this motion will result in the filing of an independent lawsuit for indemnification by Sears against Firestone. Public policy favors disposing of all aspects of a case in one lawsuit.

Based on the foregoing, Sears respectfully requests this Court enter an order granting it leave to file the attached cross-claim against Firestone, *instanter*.

Respectfully Submitted,

SEARS, ROEBUCK AND CO.

BY: _____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express mail this ____ day of May, 2001 to the attached Counsel List.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

In re BRIDGESTONE/FIRESTONE, INC.)	
ATX, ATX II AND WILDERNESS TIRES)	MDL No. 1373
PRODUCTS LIABILITY LITIGATION)	
)	Centralized before Hon. Sarah
)	Evans Barker, Chief Judge
)	Magistrate Judge V. Sue Shields
)	
JOSHUA H. MILLER,)	
)	
Plaintiffs,)	
)	
v.)	Individual Case Number:
)	IP 00-5066-C-B/S
)	
BRIDGESTONE/FIRESTONE, INC.,)	
SEARS, ROEBUCK AND CO., and)	
FORD MOTOR COMPANY)	
)	
Defendants.)	
)	

DEFENDANT SEARS, ROEBUCK AND CO.'S CROSS-CLAIM AGAINST DEFENDANT BRIDGESTONE/FIRESTONE, INC.

Defendant/Cross-Claimant SEARS, ROEBUCK AND CO. ("Sears"), through its undersigned counsel, in support of its Cross-Claim against Defendant BRIDGESTONE/FIRESTONE, INC., ("Firestone"), states as follows:

1. This is an action for damages that exceed \$ 75,000.00, exclusive of interest, costs and attorney's fees.
2. At all times material hereto, Sears was a New York corporation licensed to and doing business in the State of Florida.
3. At all times material hereto, Bridgestone/Firestone, Inc. was a foreign corporation licensed to and doing business in the State of Florida.

4. This matter has been removed to federal court, and transferred to this Court pursuant to Conditional Transfer Order No. 1, received by this Court on December 1, 2000.

5. Plaintiff alleges he was driving a vehicle equipped with Firestone tires when "the right rear Firestone Radial ATX tire of his vehicle suddenly separated which caused him to lose control of the vehicle" and he got into an accident. Plaintiff's Complaint, & 7. Plaintiff alleges that Sears installed the subject tire. Id., & 8.

6. In his Complaint, Plaintiff asserts causes of action against Sears based on negligence (Count V), strict liability (Count VI), failure to warn (Count VII), breach of warranty (Count VIII) and gross negligence (Count IX). Specifically, he alleges that Sears is liable for the damages suffered by plaintiff as a result of the accident because it "failed to use reasonable care when it marketed the Firestone Radial ATX tire in question" (Count V), placed a defective tire into the stream of commerce (Count VI), failed to "warn or instruct in the safe use of the tire" (Count VII), breached the warranties of merchantability and fitness for a particular purpose (Count VIII) and that such acts constituted gross negligence (Count IX). Plaintiff's Complaint && 17-22.

7. On or about June 10, 1997, Sears and Firestone executed a Letter of Agreement regarding Sears' purchase of certain tires from Firestone. A copy of the Letter of Agreement executed by and between Sears (the Purchaser), and Firestone (the Seller), concerning the purchase of Firestone P235/75R15 ATX II tires, which was the subject tire, is attached hereto as **Exhibit A**. It provides, in relevant part, that Firestone (referred to as "Seller") will indemnify Sears (referred to as "Purchaser") as follows:

INDEMNITY- Seller agrees to protect, defend, hold harmless and indemnify Purchaser and Purchaser's agents and distributors from and against any and all claims, actions, liabilities, losses, costs and expenses (including attorneys' fees)... (2) arising out of any actual or alleged death of or injury to any

person, damage to any property, or any other damage or loss, by whomsoever suffered, resulting or claimed to result in whole or in part from any actual or alleged defect in such merchandise, whether latent or patent, including actual or alleged improper construction and/or design of such merchandise, or the failure of such merchandise to comply with specifications or with any express or implied warranties of Seller, or... (4) arising out of the assembly, demonstration, and/or installation of merchandise covered by this Contract, or (5) arising out of or involving the failure to warn or inadequate warnings and/or instructions.

8. The Letter of Agreement between Sears and Firestone was in effect as of the date of the accident alleged in the Complaint.

9. Plaintiffs' allegations against Sears in their Complaint state claims resulting from an "actual or alleged defect" in the subject tire or "the failure of such merchandise to comply with specifications or with any express or implied warranties," claims "arising out of the assembly, demonstration, and/or installation of merchandise covered by [the Letter of Agreement]," and/or claims "arising out of or involving the failure to warn or inadequate warnings and/or instructions."

10. The Letter of Agreement, which was properly executed by Firestone, clearly requires Firestone to defend and indemnify Sears under the foregoing circumstances.

WHEREFORE, Defendant/Cross-Claimant SEARS, ROEBUCK AND CO., demands judgment against Defendant BRIDGESTONE/FIRESTONE, INC. for all sums that may be adjudged against Sears in favor of the Plaintiffs.

SEARS, ROEBUCK AND CO.

BY: _____
One of Its Attorneys

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express this ____ day of May, 2001 to the attached Counsel List.

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